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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

SUSAN BITTER SMITH, Chairman
BOB STUMP
BOB BURNS
DOUG LITTLE
TOM FORESE

2015 APR 24 P 1:58

ARIZONA CORP COMMISSION
DOCKET CONTROL

In the matter of:

CONCORDIA FINANCING COMPANY,
LTD, a/k/a "CONCORDIA FINANCE,"

ER FINANCIAL & ADVISORY
SERVICES, L.L.C.,

LANCE MICHAEL BERSCH, and

DAVID JOHN WANZEK and LINDA
WANZEK, husband and wife,

Respondents.

DOCKET NO. S-20906A-14-0063

**SECURITIES DIVISION'S RESPONSE TO
MOTION TO CONTINUE HEARING**

Arizona Corporation Commission

DOCKETED

APR 24 2015

DOCKETED BY

Re

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") respectfully submits this Response to the ER Respondents' Motion to Continue Hearing ("Motion").

I. The Motion Wholly Fails To Satisfy The Standards For A Postponement Based Illness And Should Be Denied.

The Division is sympathetic to Respondent Bersch's health issues. But the ER Respondents grossly overreach by requesting that this case be continued without setting a new hearing date. Their request for a status conference in six (6) months, before which they will file a status report (that will undoubtedly claim Respondent Bersch's health remains too fragile to proceed), would result in an indefinite continuance. Neither Respondent Bersch nor his co-Respondents should be permitted to misuse his health issues as a shield of immunity against

1 having to answer for their serial violations of the Securities Act over a 10-year period, which
2 netted Respondents Bersch and Wanzek over \$3.09 million in custodial fees and finder's fees.

3 The ER Respondents' Motion wholly fails to satisfy the standards for a postponement
4 based on the illness of a party. Those standards include a physician's affidavit (not an unverified
5 letter) that: (1) states that attending trial at the scheduled time would jeopardize the party's health
6 or that the illness would render the party incapable of functioning at the trial; and (2) provides a
7 date when the party should be able to recover enough to attend trial. *See Modla v. Parker*, 17
8 Ariz. App. 54, 58, 495 P.2d 494, 498 (1972); *Aritex Land Co. v. Baker*, 14 Ariz. App. 266, 273,
9 482 P.2d 875, 882 (1971). Since the purpose of a continuance granted because of a party's poor
10 health is to postpone the proceedings to a later date when the party will be in a better condition to
11 present his case, "the delay should be refused unless it appears that there is a reasonable
12 likelihood that this purpose will be served, that is, that the party's health is likely to improve."
13 *Continuance of a Civil Case Because of Illness or Death of a Party*, 68 A.L.R.2d 470, § 7 (1959)
14 (cited with approval in *Modla*, 17 Ariz. App. at 58, 495 P.2d at 498, and *Aritex*, 14 Ariz. App. at
15 273, 482 P.2d at 882).

16 *Modla* and *Aritex* are instructive as to why the ER Respondents' Motion should be
17 denied. In *Modla*, the plaintiff moved for a continuance of a summary judgment hearing because
18 he claimed his illness prevented him from properly preparing his case. 17 Ariz. App. at 58, 495
19 P.2d at 498. As support for his motion, the plaintiff submitted an unverified letter from his
20 physician who recommended that the plaintiff have two weeks rest. *Id.* at 58, 495 P.2d at 498.
21 The Court of Appeals held the trial court properly denied the plaintiff's requested continuance
22 "because of the insufficiency of the supporting affidavit." *Id.* at 58, 495 P.2d at 498 (citing 68
23 A.L.R.2d 470). *See also United States v. Copen*, 378 F. Supp. 99, 102 (S.D. N.Y. 1974)
24 (criminal defendant's evidence to support motion for postponement was insufficient where only
25 document relating to defendant's physical condition was letter from doctor stating that it would
26 be medically inadvisable for him to be confined to prison).

1 In *Aritex*, a defendant suffered a serious heart attack. The defense moved to postpone the
2 trial, arguing “[that defendant’s] presence was indispensable for the defense and that without his
3 presence, ‘there was [sic] only two choices left to the defense, an adverse Judgment or an adverse
4 settlement.’” 14 Ariz. App. at 273, 482 P.2d at 882. The Arizona Court of Appeals held that the
5 trial court properly denied the continuance. The court reasoned, in part, that “a postponement
6 might serve no useful purpose other than to delay trial Ad infinitum since the pressures of
7 pending litigation would most likely precipitate another heart attack.” *Id.* at 273, 482 P.2d at
8 882. See also *Chambers v. Anderson County Dept. of Social Services*, 311 S.E.2d 746, 747 (S.C.
9 App. 1984) (trial judge properly denied continuance on the ground of party’s “emotional
10 incapacity” where there was no offer of proof of incapacity nor was there any indication of when
11 party would be able to proceed.); *Barton v. Barton*, 454 S.E.2d 155, 156 (Ga. App. 1995) (trial
12 court properly denied defendant’s motion for continuance of trial date due to health reasons,
13 where recital of facts did not suggest that defendant was expected to improve so as to be
14 available for trial at later date); *Dasher v. State*, 278 S.E.2d 465, 466 (Ga. App. 1981) (where
15 defendant was seriously ill and doctors believed that the stress of trial would kill him but where
16 the uncontradicted testimony was also that his health would continue to deteriorate, trial court
17 properly denied continuance and proceeded with trial, which was held in defendant’s absence).

18 Here, the unverified letter from Respondent Bersch’s family practitioner does not warrant
19 the indefinite postponement of the hearing the ER Respondents seek. The family practitioner
20 does not state that attending the upcoming hearing would jeopardize Respondent Bersch’s health.
21 He states merely that he has advised Respondent Bersch against travel and to keep his stress
22 levels to a minimum. The latter advice could apply to all of us. The letter does not state that any
23 of Respondent Bersch’s conditions render him incapable of assisting with his defense at the
24 hearing. With respect to Respondent Bersch’s alleged panic attacks, the letter does not provide
25 any basis for attributing them to his health issues as opposed to his potential liability in this
26 proceeding and the drain on his finances from the attorneys’ fees he is paying for his defense.

1 The letter does not state what, if anything, Respondent Bersch is doing to treat his anxiety
2 disorder. Most importantly, the letter does not suggest any date when Respondent Bersch's
3 issues might improve and he could be able to attend a hearing.

4 As in *Aritex*, the postponement the ER Respondents seek would serve no purpose other
5 than to delay the hearing indefinitely. *See* 14 Ariz. App. at 273, 482 P.2d at 882. The Motion
6 should be denied.

7 **II. In Connection With Its Proposed Amended Notice, The Division Is Willing To Agree**
8 **To A Three-Month Continuance.**

9 Simultaneously with this Response, the Division is filing a Motion For Leave To File
10 Amended Notice of Opportunity for Hearing. For the reasons explained in that Motion, leave to
11 amend should be granted. If it is, the Division proposes that the hearing presently scheduled to
12 begin May 11th be continued to a hearing date in August 2015, or to the soonest available hearing
13 date thereafter. The Division's proposed continuance will enable Respondent Bersch more time to
14 address his health issues, and to prepare for the hearing he and Respondents Wanzek requested but
15 are doing everything they can to avoid.¹

16 RESPECTFULLY SUBMITTED this 24th day of April, 2015.

17 ARIZONA CORPORATION COMMISSION

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19 By



James D. Burgess
Attorney for the Securities Division
Arizona Corporation Commission

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26 ¹ *See, e.g.*, Motion to Stay Administrative Hearing Pending Appeal, filed on 4/24/2015 in *Lance Michael Bersch et al. v. State of Arizona et al.*, Case No. LC 2014-000415-001, Maricopa County Superior Court.

1 ORIGINAL and 8 copies of the foregoing
2 Response to Motion to Continue Hearing
3 filed this 24th day of April, 2015, with:

4 Docket Control
5 Arizona Corporation Commission
6 1200 W. Washington St.
7 Phoenix, AZ 85007

8 COPY of the foregoing hand-delivered
9 this 24th day of April, 2015, to:

10 The Honorable Mark H. Preny
11 Administrative Law Judge
12 Arizona Corporation Commission
13 1200 W. Washington St.
14 Phoenix, AZ 85007

15 COPIES of the foregoing sent via
16 U.S. Mail and email this 24th day of April, 2015, to:

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